FILE COPY

79543

No. [redacted] 79

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

PARAMOUNT PICTURES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

EQUITY No. 87–273

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARAMOUNT PICTURES, INC., ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on December 31, 1946. A petition for appeal was filed on February 21, 1947, and is presented to the District Court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and

Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173.

STATUTES INVOLVED

The Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., secs. 1 and 2):

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

On July 20, 1938, the appellant filed its complaint, charging the defendants with violating sections 1 and 2 of the Sherman Act by monopolizing and unreasonably restraining competition in the exhibition, distribution, and production of motion picture films throughout the United States. The major defendants were five integrated groups of corporations, commonly known as Fox, Loew, Paramount, RKO, and Warner, respectively, each of which is engaged in producing, distributing, and exhibiting such films. The remaining defendants were Columbia Pictures Corporation and certain of its subsidiaries, collectively referred to as Columbia, Universal Corporation and certain of its subsidiaries, collectively referred to as Universal, engaged in both producing and distributing motion picture films, and United Artists Corporation, a company engaged exclusively in distribution.

All eight defendants were claimed to be members of a general conspiracy to monopolize and unreasonably restrain competition in the domestic motion picture business. The five major defendants were further charged with collectively and individually monopolizing, through their theatre

operations, motion picture exhibition in about 80 percent of the cities of over 100,000 in the United States. Each of the major defendants was also charged with being, in itself, a combination in unreasonable restraint of trade. The relief prayed was that the conspiracy among all the defendants be terminated, that they be enjoined from continuing a wide variety of trade practices claimed to be illegal in themselves, and that the major defendants be compelled to divorce the exhibition business from their distribution and production activities.

Negotiations for a settlement which were undertaken before any evidence was heard resulted in the entry of a consent decree against the five major defendants on November 20, 1940. An amended and supplemental complaint brought up to date the allegations of the prior complaint, but made no substantial change in the character of the charges or the relief prayed, except to request specifically a nationwide system of enforcement through arbitration tribunals to implement such relief as might be had against unlawful trade practices of a nationwide character.

The decree adjudicated no law violations, but established a system of arbitration by which independent exhibitors could secure a hearing before an arbitrator supplied by the American Arbitration Association with respect to complaints that unreasonable licensing restrictions of

a specific character had been placed upon them by the major defendants when acting as film distributors. The decree further provided for the entry of an award against such defendants, after such hearing, intended to limit appropriately the future conduct of these defendants in dealing with the complainant and his competitors. These awards were made subject to review on appeal by any party by a specially constituted appeals board of three members appointed by the District Court. Upon affirmance by the board or expiration of time in which to appeal, the awards become final and disobedience was punishable by contempt. Operations of the system were financed by the defendants, but supervised by the Appeal Board and the America Arbitration Association. The Department of Justice intervened in some of the proceedings and was kept fully advised as to all complaints, awards, and appeals.

The decree also provided that the major defendants' feature films could not be licensed before being trade-shown and could not be offered or licensed in groups of more than five at a time. It also prohibited the forcing of so-called short subjects and newsreels by conditioning sales of feature pictures upon sales of these less important films. The only provision of the decree restricting the activities of the major defendants as theatre operators was a prohibition against their engaging in a general program of theatre

expansion. There were no prohibitions restricting their conduct as producers.

The decree expressly reserved the right of the United States to request the divorcement relief originally sought, and still prayed for in the amended and supplemental complaint, at the end of a three-year trial period. During the same period the Government was prohibited from seeking such relief either in the instant proceeding or in any other. The provisions with respect to trade showing and licensing features in blocks of five were binding upon the defendants after the 1941–42 motion picture season only if the Government had by that time subjected the minor defendants to the same relief, and while the Government did not procure such relief prior to the specified date, the major defendants continued to observe these provisions voluntarily. The decree also provided that any party might move for any modification whatsoever after the expiration of the three-year period.

The court, prior to entry of the decree, heard objections to it made by a number of independent exhibitors, through their counsel, as friends of the court. The court overruled these objections.

At the conclusion of the trial period the plaintiff found, upon a review of the consent decree's actual operation, that it was inadequate to correct the violations of law alleged in the complaint and that adequate relief could not be obtained without

a judicial finding of such violations. It therefore moved to set the issues made by the complaint and answers for trial against all eight defendants. On June 13, 1945, an expediting certificate was filed. The taking of evidence commenced before an expediting court composed of Circuit Judge Augustus N. Hand and District Judges Henry W. Goddard and John Bright on October 8, 1945, and was concluded on November 20, 1945.

At the trial the plaintiff assumed the burden of establishing its allegations and of showing that the relief granted by the consent decree was inadequate to correct the violations of law alleged in the complaint. The plaintiff's case consisted mainly of (1) an exposition of the corporate structure of each defendant; (2) the general manner in which the major defendants' theatre holdings had been acquired, with an accurate description of their individual theatre holdings by name, location, and size; (3) the precise manner in which the major defendants jointly controlled, with each other and with other exhibitors, specific theatre operations; (4) the general forms of agreement used by all the defendants in licensing films and representative executed agreements by which they had licensed each other and their affiliates upon terms which discriminated against others; (5) tabulations of film rentals paid by their theatres to all distributors and received by the defendants as distributors from all theatres,

showing the manner in which film receipts had been arbitrarily concentrated in the hands of the major defendants as theatre operators in the areas where they operated theatres and in the hands of all eight defendants as film distributors throughout the country; (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the principal theatres in the principal cities of the United States and the restrictive provisions by which a uniform run, clearance, and admission price structure in all areas was maintained; and (7) arbitration and appeal board decisions disclosing a wide variety of discriminatory effects of the defendants' licensing practice upon specific independent exhibitors.

The Government abandoned its allegations that the defendants monopolized motion picture film production by their activities as producers, but insisted that their distribution and exhibition monopolies, as such, unreasonably restricted the economic opportunities of all independent producers. The evidence offered at the trial showed that the major defendants' control over distribution and exhibition was, in general, as great at the time of the trial as it had been before the entry of the consent decree although there had been a substantial increase in the number of independently produced films.

The defense consisted mainly of (1) historical data to show that each defendant's theatres were

acquired to meet competitive threats from others; (2) rationalization of the trade practices attacked in terms of business necessity and long usage; (3) statistical data intended to minimize the importance of the defendants' position in the industry and to show that the film rental payments they made to each other were not reciprocal or uniform in amount; (4) general denials of any intent to produce the discriminatory effects shown by the plaintiff's evidence; (5) general denials of the existence of any unlawful combination or conspiracy; and (6) affirmative testimony that there was intense competition among all the defendants in their production activities and testimony by the major defendants that they received substantial economic benefits from their theatre ownership, withdrawal of which would impair their service to the public.

The case was argued on January 15, 16, and 17, 1946, and an opinion by Circuit Judge Hand was rendered for the court on June 11, 1946, and reported at 66 F. Supp. 323. It found all the defendants guilty of violating the Act by their activities in distribution and exhibition, both individually and collectively. They were found not guilty insofar as their acts as producers were concerned. Although the court found that the major defendants had jointly maintained a collectively dominant position in the distribution and exhibition fields by an illegal uniform run, clear-

744029—47——2

ance, and minimum admission price structure which permitted others to enter the business only upon terms determined by these defendants, it held that their businesses could not be aggregated for the purpose of determining whether or not they enjoyed a control over either of those fields amounting to monopoly proportions. It concluded with respect to the towns in which the major defendants had complete control over exhibition in a particular community by operating all of the theaters there, or complete first run control in a large city by operating all of the first run theaters, that there was no sufficient proof that such a position was the result of the foregoing illegal practices, rather than a lack of enterprise or competence among potential independent competitors. The court, therefore, failed to find that any of the defendants, either individually or collectively, had actually achieved a monopoly in any branch of the industry in violation of section 2, although they were found to have violated that section by attempts to monopolize.

The court also rejected the plaintiff's claim that the major defendants' vested interests in protecting their own theatre-operating profits was itself a cause of the film licensing practices by which price-fixing and clearance privileges claimed by them to be lawful under their film copyrights were illegally extended to protect theatre operators from competition with one

another. The court concluded that such practices would exist even in the absence of such ownership and that the divorcement relief sought by the plaintiff would be injurious both to the defendants and to the public. It therefore decided that such relief should not be granted, at least until a substitute remedy decreed by it should be tried and found inadequate. In lieu of divorcement relief it said that the defendants' features should be licensed picture by picture and theatre by theatre upon a basis where the films would be exhibited by the high bidder, regardless of affiliation, old customer relationships, or other criteria formerly relied on to favor arbitrarily one customer over another, provided, however, that each defendant might discriminate in any manner it chose with respect to the exhibition of its own films in its own theatres. Such relief had not been suggested by the parties or discussed in their briefs.

Certain established trade practices, such as minimum admission price fixing in film licenses and conditioning the licensing of one feature upon the taking of one or more others were outlawed unconditionally, in accordance with plaintiff's prayer. Clearance, that is, an agreement between a distributor and an exhibitor licensed on a prior run which protects the receipts of that run by providing that a given number of days must elapse before a print of the same film is made available for a subsequent run in another

theatre or theatres, was unequivocally prohibited as to theatres not in substantial competition, but the court rejected plaintiff's contention that the defendants' clearance agreements, as such, were illegal. Clearance "in excess of that reasonably necessary to protect the licensee in the run granted" was therefore declared invalid only to the extent deemed excessive.

All so-called pooling arrangements, by which one or more theatres of one or more defendants or theatres of a defendant and an independent exhibitor were operated under a profit-sharing, common management, or joint stock ownership plan, were declared unlawful and their dissolution was ordered. Where the arrangements took the form of joint stock interests in corporations,[1] these interests were to be dissolved by a sale of the defendant's stock or a purchase by the defendant of the other party's stock. All purchases by a defendant of an independent's interest were to be subject to court approval, granted only after a showing that the purchase would not unduly restrain competition. Expansion of the defendants' theatre holdings in certain other situations was also sanctioned, subject to court approval. The court also recommended in its opinion that the existing arbitration system or one similar in form should be continued as

[1] Interests of 5 percent or less were excluded from this provision as *de minimis*.

a procedural device for enforcing the prohibitions of the decree, but conditioned such use upon the consent of the parties.

Proposed judgments and findings were then submitted by all parties and hearings were had thereon on October 21, 22, and 24, 1946. Counsel representing various groups of independent exhibitors were heard as friends of the court, all of whom objected to the competitive bidding provisions of the judgments submitted by the parties in accordance with the court's opinion, which asserted that such a provision would make divorcement relief unnecessary to achieve the aims of the suit. Two of these groups sought to intervene as parties and were denied intervention, but they and all others who sought leave to argue were heard orally and permitted to file briefs. An objection common to all was that the major defendants, as theatre operators had such a tremendous advantage over all other exhibitors in financial resources and in their privilege of exhibiting their own pictures in their own theatres upon any terms they pleased, that other exhibitors could not successfully compete with them in operating theatres. Counsel for the principal independent producers in the industry were also heard as friends of the court. They argued that since they were dependent upon the distributor-defendants for profitable distribution of their films the decree's restrictions on dis-

tribution practices would hurt them more than it would the major defendants, since the latter had their own theatre outlets which were unaffected by the restrictions.

The Government's proposed judgment modified the decree outlined in the opinion in the following principal respects: (1) a provision prohibiting the major defendants from licensing films produced or distributed by them to each other for use in their theatres for a ten-year period commencing one year after the entry of judgment was proposed as a supplement to the competitive bidding relief;[2] (2) the relationships involving theatre interests held by the defendants in conjunction with independents, and found by the opinion to violate the Act, were to be dissolved only by a

[2] The primary purpose of this proposal was (a) to limit competitive bidding relief to disputes among nondefendant exhibitors insofar as the distribution of the major defendants' films were concerned; (b) to give the major defendants' theatres an incentive to bid against one another for the films of distributors not affiliated with them; (c) to compel a major defendant, as a distributor, to seek independent theatre outlets instead of another major's theatres; and (d) to prohibit the making of competitive-restricting agreements among themselves which had customarily taken the form of restrictive provisions in the film license agreements which one as a distributor made with the other as an exhibitor. A secondary effect was to compel a major defendant either to sell one or more theatres to an independent in areas so completely dominated by the defendant that there were not sufficient independent theatres to absorb the product of four of the major defendants and to increase the number of films which would be required for the major defendants' theatres from nontheatre-owning and nondefendant distributors.

sale of the defendants' interest to nondefendants; (3). the defendants were to be unconditionally prohibited from expanding their theatre holdings, either by acquiring the interests of independent partners or otherwise; and (4) all existing clearance agreements which protected the defendants' theatres were to be declared invalid. These modifications were all submitted as consistent with the opinion since they did not disturb the integrated structure of the major defendants, which the court found to be valid, but were intended to break up the illegal combination among them found by the court to exist. The existing arbitration system was to be liquidated since three of the defendants declined to agree to arbitration for any purpose and no agreement was reached between the major defendants and the plaintiff as to the substantive provisions under which such a system might operate.

The defendants offered decrees which ranged from decrees of dismissal to decrees which merely relaxed some of the provisions outlined in the opinion. The major defendants submitted a decree which included an arbitration system, apparently intended to operate simultaneously with contempt proceedings as a means of enforcement. At the hearing the major defendants suggested as a possible substitute for the so-called competitive bidding provisions a prohibition against "arbitrary refusal" to license one exhibitor a particular run sought by a competing exhibitor.

On December 31, 1946, the court entered a judgment, a copy of which is attached, rejecting the prohibition against cross-licensing sought by the Government and the prohibition against acquisition of independent partnership interests by the defendants. The court did modify the decree outlined in the opinion by providing for the liquidation of the existing arbitration system, as requested by the Government, and did prohibit all expansion of the defendants' theatre interests except that resulting from such acquisitions as the court might approve in dissolving joint relationships. It made all clearance agreements prima facie invalid when attacked and cast the burden of justifying the reasonableness of such agreements upon the distributor.

The judgment also narrowed the application of the competitive bidding provisions and added as a separate provision a modification of the provision submitted by the defendants relating to arbitrary refusals to license a run. The general means by which the competitive bidding restrictions are to be made operative are outlined in the judgment, but it neither creates nor authorizes any mechanism other than contempt by which they may be made effective. The court adopted findings of fact and conclusions of law which were substantially the same as those indicated in the opinion, with a memorandum, a copy of which is attached, which again recom-

mended voluntary arbitration as a means of resolving disputes arising under the decree.

On January 10, 1947, all defendants filed motions to amend and clarify the findings and judgment, which were denied on February 3, except for an extension of the time allowed to dissolve certain pooling arrangements.[3]

THE QUESTIONS ARE SUBSTANTIAL

The Government's appeal presents four main questions. First, accepting the expediting court's findings as to the extent and nature of the violations involved in their entirety, it erred as a matter of law in failing to enter a judgment which dealt adequately with these violations. Second, the court erred as a matter of law in concluding that the major defendants had not actually achieved a monopoly in exhibition, either singly or collectively, and that all of the defendants had not actually collectively achieved a monopoly of distribution, in violation of section 2 of the Sherman Act. Third, the court erred as a matter of law in concluding that any of the defendants may make a valid clearance agreement for the purpose of protecting any exhibitor from competition. Fourth, the court, upon proper findings as to the legal consequences of the defendants' violations, should have ordered the

[3] The changes made in the judgment by this decision have been indicated upon the face of the copy attached hereto by enclosing the provisions added in brackets.

ultimate divorcement of the major defendants' theater holdings from their distribution and production activities and should have restrained them from licensing films for exhibition in each other's theaters while such relief is being effectuated. It should also have enjoined all of the defendants from continuing to make clearance agreements.

In rejecting the relief sought by the Government in favor of a system of competitive bidding, which merely regulates the exercise of the major defendants' power to dominate the domestic motion picture film industry, the expediting court exceeded the limits of its discretion in determining appropriate Sherman Act relief. Accepting as true every fact found by the court, the major defendants are found to have collectively maintained for a substantial period of time a collectively dominant position in both the distribution and exhibition of motion picture films in this country by a conspiracy which imposed unreasonable restrictions upon the opportunity of theatres operated by others to compete with their own theatres in licensing and exhibiting motion picture films and upon the competitive opportunities of independent distributors, as well. The defendants' collective domination of distribution was admittedly nationwide.

The major defendants' domination of exhibition as theatre operators was, of course, confined to the areas in which they operated theatres, but

these areas included all but four of the 92 cities in the United States with populations of more than 100,000 and the great majority of those over 25,000. In 38 of the 92 cities of more than 100,000, one or more of the defendants operated all of the first run theatres and this was true of more than 100 cities of between 25,000 and 100,000. The decree concededly does nothing to disturb the continuance of this dominance because the opinion did not find it to be unlawful, despite the fact that it has been acquired and maintained by unlawful means.

The major defendants have not competed with each other either in buying or selling films in the past and there is nothing in the decree to induce such competition in the future. On the contrary, they are now expressly permitted to make agreements with each other for clearance "reasonably necessary to protect the licensee in the run granted." They are also now expressly authorized to retain the same vested interest in favoring each other's theatres as against outsiders that they had when the suit was begun and are further expressly authorized to use their own theatres as vehicles for discriminatory exploitation of their own films. The proposed injunction against mutual use by the defendants of each other's theatres for exploiting their films would not have prevented the latter form of discrimination, but it would have eliminated the unlawful combination among

the major defendants, insofar as that could be accomplished by injunctive provisions. It probably would indirectly compel divestiture of some of the defendants' theatres in situations where they are dominant as theatre operators, but would not eliminate them as theatre operators in any situation where they are willing to compete, as the ordinary independent exhibitor is compelled to compete, by showing the product of four or less of the defendant-distributors plus that of independent distributors. The prohibition against cross-licensing among the major defendants was therefore consistent with the court's finding that the law violations in question were the product of a horizontal combination rather than integration and was clearly required to dissolve the unlawful combination among the major defendants. In the light of recent decisions, the court's failure to find any actual monopolization of exhibition seems inexplicable. The areas of commerce embraced by the defendants' theatre operations were sufficiently large to be the subject of monopolization, even though the defendants might not be regarded as having ever intended to secure "a nationwide monopoly of exhibition." Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *Paramount Pictures, Inc.*, 63 F. Supp. 229. The decision in *American Tobacco Co.* v. *United States*, 328 U. S. 781, clearly establishes that finding of possession of monopoly power

in violation of section 2 of the Sherman Act is not dependent upon proof of "overt acts" by which it is exercised against a particular competitor, as the trial court assumed in seeking to distinguish the *Crescent* and *Schine* cases, *supra*. The *Tobacco* decision also shows that the percentage of the market controlled by two or more parties to a conspiracy to monopolize may be aggregated, as the court below thought they could not.

The principles of law announced in *Interstate Circuit* v. *United States*, 306 U. S. 208, are entirely inconsistent with the lower court's assumption that a film distributor may adopt licensing restrictions by agreement with an exhibitor which are calculated to protect the licensee from competition. If such agreements are to be sanctioned at all, their legality must apparently be made to rest upon protection of the licensor, which owns the copyright in the film licensed. But it is hardly possible to justify the making of any such agreements in the future by defendants found to have made in the past the persistent and widespread illegal use of them found in this case.

The inability of a court to regulate effectively in the public interest the illegal power found in the possession of the defendants in this case by the conventional mechanisms at its disposal was virtually conceded by the expediting court when

it recommended the adoption of an arbitration system to secure enforcement of the decree. But it apparently recognized an inherent lack of power to establish and maintain a mechanism not approved by the defendants when it conditioned the incorporation of such a system in its decree upon the consent of the parties. The fact that the Government and the defendants were unable to agree upon arbitration machinery which would make effective the trade practice provisions of the judgment should have compelled the court to revise its relief in terms of prohibitions enforceable by contempt. The court's adherence to a system of decree-administered competition in the face of obvious limitations on enforcement approaching inability to enforce at all may hardly be justified upon the basis of the court's expressed conclusion that the defendants and the public would be hurt by divorcement relief and its impliedly similar conclusion as to the Government's proposed ban on cross-licensing of films among the major defendants. There is no evidence whatsoever that the theatre-going public would suffer hardship of any kind from a change of ownership or management of theatres now owned or managed by the major defendants. Any conclusion as to the public desirability of avoiding such private injury as may result from relief necessary to achieve the objectives of the Sherman Act appears to be for Congress rather than

the courts. A specific legislative authorization would seem essential to substitute for dissolution of a monopoly which violates the Act mere regulation of its business practices.

The basic issue posed by this appeal is thus one of judicial power rather than the mere exercise of judicial discretion. If the district court is right in its assumption that the untried and unenforceable competitive bidding relief is an adequate substitute for the traditional divestiture relief and complete prohibition of future agreement among the guilty defendants, traditionally applied in situations of this character, then a proceeding under section 4 of the Sherman Act has become an instrument for protecting an established monopoly from either effective judicial or legislative correction. We submit that the district court's assumption is untenable and that reversal of its decision by this Court is required not only to secure adequate relief in this case but to maintain the validity of the equity suit as a mechanism of Sherman Act enforcement.

Respectfully submitted.

(S) GEORGE T. WASHINGTON,
Acting Solicitor General.

U. S. GOVERNMENT PRINTING OFFICE: 1947